Hydro Conduit Corporation *and* General Teamsters Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 20-RC-15340

March 31, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Acting Regional Director for Region 20 on June 30, 1981, an election was conducted on July 23, 1981, under the direction and supervision of the Acting Regional Director, among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 43 eligible voters 21 cast ballots for the Petitioner, 20 cast ballots against the Petitioner, and 1 ballot was challenged. The challenged ballot was sufficient in number to affect the results of the election. Thereafter, the Employer filed a timely objection to conduct affecting the results of the election.

On August 20, 1981, the Acting Regional Director issued and duly served on the parties his Report on Objections and Challenged Ballot recommending that the challenge to the ballot be sustained and that the Employer's objection be sustained. He further recommended that a revised tally of ballots issue to show that of 43 eligible voters 20 cast ballots for, and 20 against, the Petitioner, and that a certification of results issue. Thereafter, the Petitioner filed timely exceptions to the report.

The Board has considered the objections, the challenged ballot, the Acting Regional Director's report, the exceptions, and the entire record in this case, and hereby adopts the Acting Regional Director's findings, conclusions, and recommendations to the extent consistent herewith.[1]

In its objection to the election, the Employer alleged that one ballot which was left blank on the front side but which had the word "si" written on the back was improperly counted as a vote in favor of the Union.

The Acting Regional Director, relying on *Columbus Nursing Home, Inc.*, 188 NLRB 825 (1971), and in accordance with existing Board policy, found that the ballot, marked only on the back, should not have been counted as a vote for the Union, and sustained the objection. As a consequence, the election ended in a tie vote.

In its exception to the Acting Regional Director's finding, the Petitioner contends that the voiding of the ballot which clearly showed the intent of the voter to vote for the Union is inequitable, inconsistent with the Board's policy of considering the intent of the voter, and contrary to the admonition of several courts of appeals which have held that the Board has been inconsistent in not considering the intent of voters when such intent is manifested on the back of the ballot while considering intent expressed irregularly on the front of a ballot. We find merit in this exception.

In *Columbus Nursing Home, Inc., supra*, the Board stated:

> It is the policy of the Board to count irregularly marked ballots whenever the intent of the voter is clearly apparent. However, where, as here, a ballot contains no markings on its face, any conclusion drawn about the voter's intent based on markings on the back of the ballot must be almost entirely speculative. Rather than engage in such speculation, the Board has, since 1951, followed a policy of invalidating ballots marked in a manner so radically different from the normal method of marking ballots.

The Board has continued to adhere to that policy to the present time.

However, in light of the refusal of several courts of appeals to accept the Board's policy,[2] and the refusal of the Supreme Court to grant certiorari and render a decision on this issue,[3] the Board has reevaluated its position. We now acknowledge, in agreement with the courts, that it is inconsistent to consider voter intent if clearly, although irregularly, manifested on the front of a ballot, and yet not to consider a clear demonstration of voter intent if expressed on the reverse side of a ballot. Therefore, in keeping with our longstanding policy of attempting to give effect to voter intent whenever possible, we will hereafter count any unambiguous expression of voter intent as expressed on the ballot. Any doctrine to the contrary as expressed in *Columbus Nursing Home, Inc., supra*, or other cases where we have refused to consider voter intent when marked on the back of the ballot, is hereby overruled.

[1] In the absence of exceptions thereto, we hereby adopt, *pro forma*, the Acting Regional Director's findings and recommendations that the challenge to the ballot of James M. Faux be sustained.

[2] *N.L.R.B.* v. *Manhattan Corporation, Manhattan Guest House, Inc.*, 620 F.2d 53 (5th Cir. 1980); *Robert Door and Window Company* v. *N.L.R.B.*, 540 F.2d 350 (8th Cir. 1976); *Mycalex Division of Spaulding Fibre Co., Inc.* v. *N.L.R.B.*, 481 F.2d 1044 (2d Cir. 1973); *N.L.R.B.* v. *Tobacco Processors, Incorporated*, 456 F.2d 248 (4th Cir. 1972); *N.L.R.B.* v. *Titche-Goettinger Company*, 433 F.2d 1045 (5th Cir. 1970).

[3] *N.L.R.B.* v. *Manhattan Corp., Manhattan Guest House, Inc.*, 452 U.S. 916 (1981).

In this case the election involved only one union, and the ballot presented a single yes or no choice. Since the word "si" written on the back of the ballot unmistakably indicates that the Spanish-speaking employee wishes to be represented by the Union, we find that the ballot is valid and counts as a vote for the Union. Therefore, the Employer's objection is overruled. A second revised tally of ballots will indicate that of approximately 43 eligible voters 21 cast ballots for the Petitioner and 20 cast ballots against the Petitioner; there are no unresolved challenged ballots. We shall certify the Union as the representative of the Employer's employees in the appropriate unit.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for General Teamsters Local 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Highway 32, Orland, California, plant; excluding office clerical employees, quality control employees, guards and supervisors as defined in the Act.

MEMBER FANNING, concurring and dissenting:

I agree with my colleagues that it is inconsistent for the Board to consider the intent of voters if expressed in an irregular manner on the front of the ballot but not if it is marked on the back but I disagree with their solution. Our ballots contain clear, explicit instructions on how a voter is to designate his or her selection. I do not know why in some cases voters ignore these instructions. It is always possible, of course, that a ballot is cast in a manner at variance with the norm because the voter intended to identify that ballot. Such an arrangement could easily be used by a party to the election to insure that an employee votes in a particular prearranged manner, could destroy the secrecy of representation elections, and could lend encouragement to fraud, bribery, or corruption.

I agree that we should always attempt to give the fullest effect to the intent of the voter where his intent is clear and his ballot has been cast in a manner consistent with the efficient administration of a free representation election. However, I am persuaded that any ballot that is not properly marked according to the instructions provided on the face of the ballot should be invalidated. By expanding our search for voter intent the majority has opened the door to speculation and subjective interpretation as varied as the different officials who run our elections, the Board Members who are requested to review the decisions of subordinate officials, and appellate judges who are called on to review Board decisions. My colleagues are now encouraging just that kind of extended litigation.

In a time of reduced appropriations with stringent budget and personnel constraints, it seems to me our review and adjudicating time would be spent more productively and more efficiently on other significant matters that would require the exercise of our experience and judgment. I think the Board's concern for the proper administration of an election justifies a fixed and impartial rule that no irregular mark on the ballot should count as a valid vote. This lies well within our administrative authority. I would have preferred that the Board, through its rulemaking procedures, formulate a specific rule that any ballot not marked in accordance with the clear and explicit instructions printed on the ballot will not be counted. This would permit every voter to cast a clear vote, expedite the finalization of elections, and avoid the unnecessary use of time and money to guess at what a voter might—or might not—have intended.

Court dissatisfaction with the Board's past approach has, by and large, stemmed from dissatisfaction with our practice of determining the intent of a voter who mismarks the front of the ballot while holding that similar marks on the back do not show intent. I believe, however, that the courts would honor a Board rule based on the considerations alluded to above.

However, as my colleagues have rejected this approach, I agree with them that the disputed vote in this case was an affirmative vote for the Union and I would certify the Union.

MEMBER JENKINS, dissenting:

I would continue to adhere to the Board's longstanding policy invalidating ballots marked solely on the reverse side of the ballot for the reasons set forth in *Columbus Nursing Home, Inc.*, 188 NLRB 825 (1971), and *Manhattan Corporation, Manhattan Guest House, Inc.*, 240 NLRB 272 (1979). Accordingly, I would adopt the Acting Regional Director's recommendation to sustain the objection to the ballot at issue herein.